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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 738

T. LAMAR CAUDLE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 739

MATTHEW J. CONNELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Caudle Pet. 84–106; Connelly Pet. App. A, pp. 1a–22a) is reported at 249 F. 2d 576. The memorandum opinion of District Judge Gunnar H. Nordbye denying petitioners' motions for a judgment of acquittal or new trial (Caudle Pet. 43–83; Connelly Pet. App. C, pp. 24a–63a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1957 (Caudle Pet. 107), and a petition for rehearing was denied on December 13, 1957 (*ibid.*, p. 108). On December 20, 1957, in No. 739, and on December 30, 1957, in No. 738, Mr. Justice Whittaker extended the time for filing petitions for writs of certiorari to and including January 23, 1958 (Caudle Pet. 109; Connelly Pet. App. E, p. 64a), and the petitions in both cases were filed on that day. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of any constitutional right by being called before the grand jury as witnesses after being fully warned both as to their constitutional rights and the possibility that their testimony might be used against them in future proceedings, and prior to the time that any accusation against them had been made or decided upon.

2. Whether it was an abuse of discretion for the district court to deny a motion for new trial which was based solely on evidence that two jurors had had Republican Party connections which they had failed to indicate on *voir dire* in answer to a question as to present political activity.

3. Whether, after petitioners had contended that they would be prejudiced if tried by jury in St. Louis, Missouri, the district court erred in ordering *sua sponte* that the petit jury panel be drawn from the

Eastern District of Missouri exclusive of St. Louis City and County, pursuant to 28 U. S. C. 1865 (a).

4. Whether the unavoidable severance as to co-defendant Schwimmer during the trial due to his illness required a mistrial also as to the petitioners, on the theory that certain evidence relating to Schwimmer's post-conspiracy behavior which had been originally admitted against Schwimmer alone, and which did not implicate petitioners, could not be fairly taken out of the case by full and unchallenged instructions by the court to the jury.

5. Whether a page from co-conspirator Schwimmer's account book evidencing an agreement between the conspirators both as to their past and future activities was admissible as an act or declaration of a co-conspirator made during and in furtherance of the conspiracy.

6. Whether stenographic notes of official telephone calls into the office of the Chief Counsel of the Bureau of Internal Revenue made in the routine and customary course of office business were admissible in evidence under the Federal Business Records Act.

7. Whether, where the trial judge died after verdict, the successor judge, appointed pursuant to Rule 25, F. R. Crim. P., to perform the remaining duties, abused his discretion in concluding that he was competent to consider and rule on the pending motions, including motions attacking the legal sufficiency of the evidence in support of the verdicts.

8. Whether the evidence was sufficient.

RULES INVOLVED

Rule 25, F. R. Crim. P., provides:

> If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Rule 29, F. R. Crim. P., provides:

> (a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information, after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without hav-

ing returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

STATEMENT

Petitioners, together with one Harry I. Schwimmer, were indicted under a single count indictment charging that they, in violation of 18 U. S. C. 371, conspired with others including Irving Sachs and Shu-Stiles, Inc. (1) to defraud the United States Government of the honest services of petitioner Connelly (as Appointment Secretary to the President of the United States) and of petitioner Caudle (as Assistant Attorney General in charge of the Tax Division of the Department of Justice); and (2) to defraud the government of its right to have those offices, the Internal Revenue Service, the District Court, and its Probation Office and the laws pertaining to the conduct of the business of those offices, administered free from fraud, and to have matters pending before those agencies judged and determined by their administrators without corruption, partiality, improper influence, bias, dishonesty, and personal and pecuniary interest in the outcome. The principal object of the conspiracy related to the corrupt handling of the tax evasion of co-conspirators Irving Sachs and Shu-Stiles, Inc.

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in the Internal Revenue Service, the Tax Division of the Department of Justice, and in the District Court, between the inception of that case in 1945 and its ultimate prosecution in 1952, and thereafter; twenty-four overt acts in furtherance of the conspiracy were alleged between January 20, 1948 and February 27, 1952 (R. 7–10). Both petitioners were ultimately found guilty under the indictment and each was sentenced to two years' imprisonment and fined $2,500 (R. 153) under circumstances more fully explained below (*infra*, pp. 33–34). On appeal to the Court of Appeals for the Eighth Circuit, the judgments were unanimously affirmed (Caudle Pet. 107; Connelly Pet. App. B, p. 23a); a petition for rehearing was denied (Caudle Pet. 108; Connelly Pet. App. D, p. 63a).

The evidence in support of the judgments appealed from is reviewed at length in the 40 page memorandum opinion of District Judge Gunnar H. Nordbye[1] denying motions for judgments of acquittal or in the alternative for a new trial (see Caudle Pet. 60–82; Connelly Pet. App. C, pp. 41a–63a), and in the 22 page opinion of the Court of Appeals which again found the evidence legally sufficient to sustain the judgments (see Caudle Pet. 98–103; Connelly Pet. App. A, pp. 14a–19a). For a general statement of the evidence we respectfully refer the Court to those opinions. The particular facts with respect to each

[1] As we more fully explain below (*infra*, pp. 32–35), Judge Nordbye was designated to act in Judge Hulen's stead pursuant to Rule 25, F. R. Crim. P., after Judge Hulen died following the verdicts in the case.

of the various points raised by petitioners are presented below in connection with our discussion of those issues.

ARGUMENT

I

Testimony of petitioners before the grand jury

Petitioners testified before the grand jury that returned the indictment against them. They contend that their privilege against self-incrimination was violated in this respect and that the trial court erred in denying their motion to dismiss the indictment and to suppress all their grand jury testimony (Caudle Pet. 29–31; Connelly Pet. 10–16).

It is clear that, whatever evidence the grand jury may have considered, the indictment should not have been dismissed (*Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359; *Lawn* v. *United States*, 355 U. S. 339), and petitioners do not appear seriously to contend otherwise. Petitioners' main argument that all of their grand jury testimony should have been suppressed is equally without merit.

Their theory is that, while an ordinary witness before a grand jury need not be advised of his privilege against self-incrimination, a potential defendant must be so advised, and also that once it has been decided to seek an indictment against a person he must be fully apprised of that fact or subsequent testimony cannot be used against him. The trial court adopted petitioners' theory, found that it was on the evening of November 22, 1955 that the prosecutor concluded that in all probability he would submit an indictment

naming the petitioners, and ordered suppressed all grand jury testimony of the petitioners given after that date. Petitioners thus prevailed below on the basic legal issue involved. What they are here challenging is the trial court's factual finding. They claim that during the period prior to November 22, 1955, when there was a steadily increasing chance that their statements might be used against them, they were not adequately warned of their position and of their constitutional privilege to remain silent.

(*a*) The record, however, makes it abundantly clear that both petitioners were fully and adequately warned and that neither was in any way compelled to give testimony against himself.

Petitioner Connelly. Petitioner Connelly was "a man experienced in the investigation of fraud and criminal matters" and "had been a chief investigator for a Senate committee which had, over an extended period, itself investigated . . . many fraudulent and criminal situations." (Motions Tr. (January 27, 1956) pp. 51–52).[3] He first testified before the grand jury, under subpoena, on June 13, 1955, together with a large number of other persons. He was informed of his constitutional rights by government counsel, as follows (Motions Tr. (January 27, 1956) p. 17):

> Q. Mr. Connelly, we follow the practice of advising all former government officials of their rights. I am sure you are familiar with this,

[3] The two transcripts of the testimony taken on petitioners' motion to suppress on January 27, 1956 and February 3, 1956 are contained in Volume I of the unprinted record. We employ the page numbering of the court reporter as to each of the two transcripts.

but we follow that practice. Are you aware of the fact that you have a right to decline to answer any question on the ground that your answer might tend to incriminate you?

A. Yes, sir.

Q. Are you aware of the fact that if you give information, it may be used against you in any proceeding in which it is relevant, if any such proceeding should arise?

A. Yes, sir.

Connelly next appeared before the grand jury on November 18, 1955, again in response to a subpoena. On that occasion he was again reminded of his privilege (Motions Tr. (January 27, 1956) p. 23):

> Q. Mr. Connelly, you have been before the grand jury before and you understand your constitutional rights, I am sure.
>
> To which he said: "Yes, Sir."

On November 21, 1955, Connelly appeared again before the grand jury at his own request and volunteered certain testimony to clarify what he had previously said (Motions Tr. (January 27, 1956) p. 13). He was warned as follows (Tr. 15–16):

> Q. And I think you should further be advised that the grand jury is considering, among other things, whether it will take any action with respect to you personally.
>
> To which Mr. Connelly replied: "Right."
>
> * * * * *
>
> Now, Mr. Connelly, is it correct that you appear this morning and request an opportunity to appear before the grand jury to make another statement?
>
> A. Yes, sir.

> Q. Before you make any statement, I want to repeat the warnings. Do you understand that you have a right to refuse to answer any question on the grounds that your answer would tend to incriminate you?
>
> A. Yes, sir.
>
> Q. Do you understand that any statement you may make here may be used against you?
>
> A. Right, sir.

Connelly concedes that "when a potential defendant is adequately apprised of the situation confronting him * * * he may waive his rights and become a witness." (Connelly Pet. 14). This record shows that he was so apprised.

Petitioner Caudle. Petitioner Caudle had been a United States Attorney, Assistant Attorney General in charge of the Criminal Division, and Assistant Attorney General in charge of the Tax Division (which handles criminal tax evasion cases). He appeared before the grand jury first on June 18, 1955 and then on November 21, 22, and 29, 1955 (Motions Tr. (February 3, 1956) pp. 6, 16).

Government counsel, Mr. Newcomb, testified that on June 18, 1955, he warned petitioner Caudle as follows (Motions Tr. (February 3, 1956) pp. 19, 38):

> * * * I warned him, reminded him of his constitutional right to refuse to answer any question on the ground that his answer would tend to incriminate him, and I warned him that anything that he did say could be used against him in any proceeding in which he—in which it might be relevant.
>
> * * * * *

> In June, 1955, when he was before the grand jury, he was sworn, warned, or told of his constitutional right to refuse to answer, and he was told that if he did answer, any information he gave could be used against him. He was told at that time that the grand jury was investigating the question, among others, as to whether he, Caudle, had participated in obstructing justice in connection with th 1955 inquiry, and in June, 1955, he made statements and volunteered statements right here at that time of some length about the Sachs case.

On November 21, 1955, the next occasion when petitioner Caudle testified before the grand jury, he was warned as follows (Motions Tr. (Febr ary 3, 1956), pp. 19–21):

> Q. (Continuing) You understand, do you not, that you have the right to decline to answer any question on the ground your answer would tend to incriminate you?
>
> A. Yes, sir.
>
> Q. Do you know that any statement that you make here can be used against you?
>
> A. Yes, sir.
>
> Q. You should be further advised that the grand jury is considering a very grave situation.
>
> A. Yes, sir.
>
> Q. In which there is substantial evidence tending to indicate that the Sachs case was fixed, and the grand jury is attempting to determine, among other things, whether you were one of the persons who, if it was fixed, fixed it.
>
> A. Yes, sir.
>
> * * * * *

Q. This is a very, very serious situation, as you must understand.

A. Yes, sir.

These excerpts make it clear that both petitioners were fully warned of their rights, and were also duly warned that actions against them personally might result.

(*b*). It was on the evening of November 22, 1955 that the prosecutor decided to seek an indictment of the two petitioners (Motions Tr. (January 27, 1956) p. 20; R. 52). Petitioners argue that prior thereto they were "potential" defendants and their testimony should have been suppressed on that ground. Certainly, each of them appeared before the grand jury at a time when there was substantial chance that he would be indicted. But if there had been no such chance there would have been no need whatever for warning them. As we have just set forth, the record shows that each of these men, who were hardly ignorant of their rights in any event, was not only fully advised of his constitutional privilege but was specifically told that he was among those as to whom the grand jury was considering whether or not to take action. *Supra*, pp. 8–12. This is manifestly not a case involving the calling of "de facto defendants" before a grand jury for the purpose of obtaining damaging admissions. Both petitioners, knowing the subject-matter of the inquiry and being fully advised of its implications, actively and voluntarily[3] sought to exculpate themselves in the grand jury proceedings.

[3] Petitioner Connelly asked to appear before the grand jury and volunteered his November 21st testimony; petitioner Caudle, on that day, consented to turning over certain papers

It was only after they had failed to do so that they attacked the legality of the inquiry.

As we have shown, there is no legal issue in this case as to what testimony may be taken from a person after it has been decided to seek an indictment against him; the trial court suppressed all such testimony. There is no issue as to what use may be made of grand jury testimony where a witness has not been fully informed of his rights, or of the chance that an indictment might be brought against him; both of these defendants were so informed. The only real claim petitioners make is that the trial court erred in not finding that the prosecutor had determined to seek an indictment a day or two prior to November 22d; that narrow factual issue is obviously not one to be reviewed by this Court.

The cases cited by petitioners have no bearing on the facts of this case. See *Powell* v. *United States*, 226 F. 2d 269, 274 (C. A. D. C.):

> * * * it would seem to be clear that a person summoned to appear before a Grand Jury could not validly ignore the subpoena merely because an indictment against him might eventuate from the inquiry.

Forewarned, petitioners chose to testify before the grand jury without a claim of privilege and cannot now be heard to complain that their Fifth Amendment rights were violated. Their testimony, like that of the defendants in *United States* v. *Klein*, 247 F. 2d 908, 920–921 (C. A. 2), certiorari denied, Janu-

located in his home in Waynesboro, North Carolina, "to remove any suspicion on me". (Motions Tr. (Feb. 3, 1956) pp. 21–22).

ary 13, 1958, No. 592, this Term, although under subpoena, was voluntary in every respect, and as in that case, petitioners were fully warned of their rights and liabilities. They were no more marked for prosecution than the defendant in *United States* v. *Scully*, 225 F. 2d 113 (C. A. 2), certiorari denied, 350 U. S. 897, who, unlike petitioners, had not been advised of his Fifth Amendment rights. For these reasons, we believe that the opinion below is not in conflict or inconsistent with any of the cases cited by petitioners.

II

Republican connections of two petit jurors

In a post trial motion for a new trial based on newly discovered evidence (see R. 130–131, 134–141), petitioners sought a new trial on the ground of the alleged failure of two jurors, Goldie Brown and Grace Hoffman, to respond when questioned on the *voir dire* examination in respect to two questions asked them by the district court during the course of an extended examination by the court of prospective jurors. The 53-page transcript of this *voir dire* examination[4] shows that the following questions were asked, and that in each case neither of the two jurors responded:

(1) [V. D. Tr. 37]:

> The COURT: Would either of you be embarrassed in arriving at a verdict of not guilty by reason of your employment or by reason of

[4] We designate references to this transcript by the symbol "V. D." The *voir dire* transcript appears as Volume II in the unprinted record in this Court.

your membership in any affiliation club or society or any other organization whatsoever? If so, raise your hand.

Have any of you or the immediate members of your family, mother, father, brother, sister or husband or wife, or children, other than the gentleman who was sheriff, have you or any immediate members taken part in behalf of either political parties in political affairs such as a candidate for office or committee worker?[4]

(2) [V. D. Tr. 44]:

The COURT: Do either of you or are any members of your family affiliated or hold membership or office—we have covered county committees, but sometimes there are Democratic or Republican organizations separate from the committee, and sometimes Democratic clubs or Republican clubs? To your knowledge, are you or any member of your family any members of such club or organizations? If so, raise your hand.

In the course of the hearing on motion for new trial on March 5, 1957, testimony was adduced to the effect that both Goldie Brown and Mrs. Grace Hoffman had been members of the Women's Republican Club of Montgomery City, Missouri, from 1953 to December 1955 (Tr. 3229–3233, 3234–3237), but were not members on May 7, 1956 at the time of the voir dire examination and were not seen at meetings

[4] Several of the prospective jurors replied that they or close relatives were Democratic or Republican committeemen (V. D. Tr. 37–38) or had associates employed by the F. B. I. or the Bureau of Internal Revenue (V. D. Tr. 43–44), or belonged to partisan clubs (V. D. Tr. 44–46). After each stated that his political affiliations would not affect him as a juror in the case, Judge Hulen qualified the whole panel (V. D. Tr. 53).

in 1956 (Tr. 3237). Neither woman was an officer in this club (Tr. 3234, 3235),[6] and neither engaged in political activities (Tr. 3240), except to the extent that each had served at the polls in 1952 and 1954 on appointment by the county court (Tr. 3241–3242, 3244–3246). In addition to these facts it was developed that Bob Hoffman, the son of Mrs. Grace Hoffman, had been treasurer of the County Republican Committee but never attended a committee meeting and had not run for that or any other office (Tr. 3240, 3241, 3244). His only activity seems to have been signing receipts for filing fees of candidates for office in 1956 which he filed with the county court (Tr. 3244).[7]

On the basis of this showing, petitioners contended, on the motion for a new trial, that the two jurors should have supplied this information in response to the questions set forth above, and their failure to do so deprived petitioners of an opportunity to exercise properly and intelligently (R. 136) "their peremptory challenges." No allegation was made of any fact tending to show that either juror was actually biased or prejudiced (R. 130–131, 134–141).

At the outset, it should be noted that petitioners do not contend (R. 130–131; 134–141) that the jurors concealed information which would have been the basis of a challenge for cause, nor did they allege that either of the two jurors was actually prejudiced against them. What is alleged is a "lack of truthful-

[6] Goldie Brown had served on a refreshment committee (Tr. 3234).

[7] The clerk of the county court was not sure whether Bob Hoffman's position was a political office (Tr. 3243–3244).

ness" (Connelly Pet. 20) and a failure to disclose information which conjecturally might have caused petitioners to exercise a peremptory challenge.

As to the alleged lack of truthfulness, it is apparent from the testimony taken on the motions that neither juror had in fact been a candidate for office or a worker on a political committee in the past, within the intendment of the first question (*supra*, pp. 15–16). The second question, as pointed out by petitioner Connelly (Connelly Pet. 21, fn. 12), "was by its terms limited to present membership". And neither of the two jurors was then currently a member of a political club. Petitioners' suggestion that the jurors should have guessed that the court was interested in past activity,* and volunteered the information, is hardly a basis for alleging such lack of truthfulness as to taint the jurors' relation to the court and the parties (Connelly Pet. 20).

The only possible information that could be construed to have been withheld was the irrelevant fact that Mrs. Hoffman's son was a treasurer of the Republican County Committee, although the testimony showed that he had not attended its meetings and he had confined his activities to signing filing-fee receipts

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* That in fact the court was only interested in present political activity is suggested by the responses of prospective jurors distinguishing between present and past membership (V. D. Tr. 44–46), and the fact that by way of amplification the court asked the further questions (V. D. Tr. 46, emphasis added):

> The Court: Are either of you engaged and actively in politics, either as a candidate or supporter of some other candidate *at this time?*
>
> Are either of you actively engaged in politics *at this time* as a candidate?

of candidates for filing in the county court. And as both Judge Nordbye (Caudle Pet. 49) and the Court of Appeals (Caudle Pet. 97–98) observed, there was no showing that Mrs. Hoffman knew of this fact, or that her failure to respond was in any respect untruthful or fraudulent.

The conclusion of Judge Nordbye, which was affirmed by the Court of Appeals, to the effect that the hearing indicated no valid basis for a new trial because of prejudice to the petitioners comes within this Court's rule announced in *United States* v. *Johnson*, 327 U. S. 106, 111, "that findings * * * by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances * * *".

In any event, it is clear on this record that the nondisclosure of Mrs. Hoffman's son's connection with a political party is not "so obvious a disqualification or so inherently prejudicial as a matter of law * * * to require the court * * * to set the verdict aside and grant a new trial". *Frazier* v. *United States*, 335 U. S. 497, 513; and see *Dennis* v. *United States*, 339 U. S. 162; *United States* v. *Wood*, 299 U. S. 123; *Raub* v. *Carpenter*, 187 U. S. 159, 161–164. These cases and lower court decisions have rejected the theory of imputed bias as a basis for new trial after verdict. See *Deschenes* v. *United States*, 224 F. 2d 688, 691 (C. A. 10) (juror was member of crime commission); *Ryan* v. *United States*, 191 F. 2d 779, 782 (C. A. D. C.), certiorari denied *sub nom. Duncan et al* v. *United States*, 342 U. S. 928; *Cavness* v. *United States*, 187 F. 2d 719, 723 (C. A. 9) (juror who was a

reserve police officer failed to respond to question as to whether any juror was or had been a police officer); *Carpenter* v. *United States*, 100 F. 2d 716, 717 (C. A. D. C.) (failure of juror to answer question as to whether he knew counsel). The cases cited by petitioners dealing with the issue of actual bias of a juror and deliberate concealment of a relevant fact (*e. g.*, *United States, ex. rel. De Vita* v. *McCorkle*, 248 F. 2d 1 (C. A. 3), certiorari denied, 355 U. S. 873), are not in point. Petitioners did not, in their motions below, contend that the facts allegedly withheld would have been the basis for a challenge for cause (*i. e.*, actual bias), and the courts below found no basis for a finding of knowing or willful concealment by the juror.

This Court has already stated that a juror's active participation in politics cannot be said to be *per se* a disqualification for jury duty as a matter of law. In *Connors* v. *United States*, 158 U. S. 408, the defendant was charged with carrying away and secreting a ballot box containing votes cast for a congressional representative. The defendant sought to interrogate jurors on *voir dire* examination concerning their political affiliations and the trial court excluded the questions.*

This Court stated (158 U. S. at 414–415):

> We are of opinion that the court correctly rejected the question put to the juror

* The questions were (158 U. S. at 412):

Q. Were you ever at any time a judge or clerk of an election; and, if so, when and where, and by what party were you named and appointed?

Q. Are you a member of any political club organized for the advancement of the interests of any political party; and, if so, what party?

Stewart as to his political affiliations. The law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute. So, also, active participation in politics cannot be said, as matter of law, to imply either unwillingness to enforce the statutes designed to insure honest elections and due returns of the votes cast, or inability to do justice to those charged with violating the provisions of those statutes. Strong political convictions are by no means inconsistent with a desire to protect the freedom and purity of elections.

* * * The public should not be taught, by the mode in which trials of this character are conducted, that the prosecution of a crime against the laws securing the freedom and integrity of elections for Representatives in Congress will be regarded by the court as, in effect, a prosecution of a political party to which the accused belongs. If any inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections.

See also *Aldridge* v. *United States*, 283 U. S. 308, 314, fn. 4; *Dennis* v. *United States*, *supra* (339 U. S. 162, 168; and *id.*, concurring opinion of Mr. Justice Jackson, 339 U. S. at pp. 174–175). Clearly, if disallowing such questions on *voir dire* examination has been held non-prejudicial in an election fraud case, petitioners could not have been prejudiced in this case, where the question, under any interpretation, could not have established a legal disqualification. The assumption of the American jury system is that jurors will not be dissuaded from an honest verdict by such political considerations.[10]

III

Selection of the jury from the district exclusive of St. Louis

On January 20, 1956, both petitioners filed motions to have their cases transferred to the District of Columbia (R. 24–27, 30–35, 35–43). Petitioner Caudle's motion was based on allegations of local prejudice in St. Louis (R. 24–27). These motions were overruled on January 27, 1956 and the case was set down for trial on May 7, 1956 (R. 43). Petitioners again raised this issue in petitions for a writ of mandamus to the Court of Appeals for the Eighth Circuit which were denied on March 17, 1956 (R. 68–69).

[10] The fact that the petitioners might have exercised peremptory challenges had they had the allegedly withheld information has no more relevance here than it would have where an examination into the political attitudes of jurors is cut short by the court, as in some of the above-cited cases. It would be a veritable impossibility in any event to speculate on appeal whether the defendant would, given the added irrelevant information, have exercised a challenge.

On April 3, 1956 (prior to the trial on May 7, 1956), Judge Hulen ordered that the jury panel be drawn from a panel of talesmen chosen from that part of the eastern judicial district of Missouri exclusive of the City of St. Louis and St. Louis County (Tr. 3211–3212). While the record does not specify the reason for this order, it was shown that the prosecution had nothing to do with its issuance (Tr. 3214).

Petitioners, who first contended by motion in the district court and in a mandamus action in the Court of Appeals that they would be prejudiced by the selection of a jury from the St. Louis area, now contend that they were prejudiced by excluding the St. Louis area from the district from which the panel of talesmen were drawn.

We submit that, on the contrary, Judge Hulen's order was in every respect consistent with 28 U. S. C. 1865 (a) providing:

> * * * petit jurors shall from time to time be selected from such parts of the district as the court directs *so as to be most favorable to an impartial trial,* and not to incur unnecessary expense. [Emphasis added.]

Since the "mode in which the jury shall be selected" was left by the Sixth Amendment "in the discretion of the legislature, with no restriction or limitation, except that the accused should have the right to be tried by an impartial jury" (*United States* v. *Wood,* 299 U. S. 123, 146; *Frazier* v. *United States, supra,* 335 U. S. at p. 511), the proper inquiry in any case is whether the jury was selected from such parts of the district "so as to be most favorable to an impartial

trial" within the meaning of the statute. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 221. This determination is largely a matter of discretion in the court (*Frazier v. United States, supra,* 335 U. S. at p. 511; *Stroud* v. *United States,* 251 U. S. 15, 20), and there is no showing of abuse in this case.

The selection of an impartial jury from part of a district, to avoid local prejudice or unnecessary expense, has been consistently sanctioned by this Court. *Lewis* v. *United States,* 279 U. S. 63, 72; *Stroud* v. *United States,* 251 U. S. 15, 18–20 (exclusion of county of Leavenworth on claim of local prejudice); *Ruthenberg* v. *United States,* 245 U. S. 480, 482; *Agnew* v. *United States,* 165 U. S. 36, 42–45. And see on closely analogous facts: *Spencer* v. *United States,* 169 Fed. 562 (C. A. 8) (jury order excluded jurors from Polk County, Iowa, including the city of Des Moines);[11] *Jarl* v. *United States,* 19 F. 2d 891 (C. A. 8), and *Myers* v. *United States,* 15 F. 2d 977 (C. A. 8) (jury orders excluded Douglas County including the city of Omaha, Nebraska); *Walker* v. *United States,* 93 F. 2d 383 (C. A. 8), and *Ryan* v. *United States,* 99 F. 2d 864, 870–871 (C. A. 8) (jury orders excluded Jackson County including Kansas City); and cf. *Gariepy* v. *United States,* 220 F. 2d 252, 258 (C. A. 6); *United States* v. *Titus,* 210 F. 2d, 212–213 (C. A. 2); *Frantz* v. *United States,* 62 F. 2d 737, 738–739 (C. A. 6). None of the cases cited by petitioners (Caudle Pet. 33) present a conflict, and

[11] This holding was cited with approval by this Court in *Ruthenberg* v. *United States, supra* (245 U. S. at p. 482).

to the extent they are apposite at all, they support the government's position.

Both the petit jury (as finally selected) and the jury panel represented a fair cross-section of a large geographical community. It was neither predominantly urban or rural in its constituency. There is no showing of a systematic attempt to exclude any group, race, sex, or category of citizens. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Glasser* v. *United States*, 315 U. S. 60, 83–87. Of the panel, six of the prospective jurors had lived for some time in St. Louis or other large cities (Brante (V. D. Tr. 26, 48); Mrs. Brown (V. D Tr. 48); Ettling (V. D. Tr. 49); Williams (V. D. Tr. 51); McCan (V. D. Tr. 51); and Morris, alternate (V. D. Tr. 52)). Mrs. Brown, Williams and McCan were included among the twelve jurors actually selected. Many of the other jurors lived in large towns. The court questioned the jurors concerning their occupations, which were not primarily agricultural but included a wide range of professions and trades (V. D. Tr. 25–35). Several of the jurors or their husbands worked for large business concerns (V. D. Tr. 25, 26, 27, 31). Others were a city tax collector (V. D. Tr. 27), automobile dealers (V. D. Tr. 27, 28, 34), real estate salesmen (V. D. Tr. 29, 30, 33), a contractor and builder (V. D. Tr. 33), a store owner (V. D. Tr. 35), a bank president and a bank worker (V. D. Tr. 29–30, 35), an electrical company officer (V. D. Tr. 31), a partner in a shoe business (V. D. Tr. 30), the wife of a city attorney (V. D. Tr. 32) and others.

In short, petitioners have failed to show that Judge Hulen's order, which was obviously promulgated to meet their complaint of local prejudice in the St. Louis area, was in any respect not "favorable to an impartial trial." 28 U. S. C. 1865 (a).

IV

Mistrial as to co-defendant Schwimmer

Following the *voir dire* examination and the selection of the petit jury on May 7, 1956, the trial was commenced the following day (Tr. 39). On May 23, 1956, the defendant Schwimmer suffered a heart attack, requiring continuances until May 28, 1956 on which day a mistrial was ordered as to him and he was removed as a defendant in the case when it appeared that he would be incapacitated for an indefinite period (Tr. 1486, 1535). Petitioners moved for a mistrial as to themselves on the grounds (1) that evidence already admitted limited to Schwimmer alone could not be properly expunged by instructions to the jury, and (2) the continued presence of Schwimmer in the trial was necessary to their defense (Tr. 1535–1538, 1544–1547).[12]

The evidence which had been admitted against Schwimmer alone (Tr. 870–873; 1246–1257) tended to show that Schwimmer was attempting to conceal his records after the grand jury investigation of the instant case was well under way and that he feared the effect of certain testimony given by one Sheffrey to the grand jury relative to a conversation the two

[12] Prior to trial each petitioner had moved for a severance of his case and a separate trial (R. 11, 30).

men had together in 1950 when Schwimmer had stated his desire to do something for Caudle.

On June 7, 1956, Judge Hulen granted the petitioners' motion to strike the above items of evidence (Tr. 2732) and the issue was then disposed of as follows (Tr. 2732–2733):

> The COURT: * * * The motion of defendants, Matthew J. Connelly and T. Lamar Caudle, to strike certain evidence is sustained, except the testimony of David L. Sheffrey before Judge George H. Moore, as referred to on pages 8 and 9 of the motion.
>
> Now, the question is, the part that is withdrawn, the procedure to get that taken from the jury, to read that testimony to the jury again, to my mind would accentuate it probably.
>
> Mr. MARGIOTTI [defense counsel]: I think so too. I think, your Honor, if you would simply call it to their attention and tell them the effect of that testimony, that that is all that is necessary, because this jury remembers the highlights of the testimony. They don't remember details of testimony.

Before the case was submitted to the jury, Judge Hulen first summarized, and then specifically instructed them to disregard, the testimony which had been stricken (Tr. 2913–2916). In this connection, Judge Hulen stated to the jury (Tr. 2916):

> * * * Now, as to the testimony given by these two witnesses as I have referred to them as to these conversations with Schwimmer, I withdraw that testimony from your consideration. I have not gone into it in detail, but you will recall it. You are not to consider such testimony

as evidence in this case of any character. Just forget that that testimony relating to the subject and at the times I have referred to was given in this case. Strike it from your minds entirely. It now has no bearing on the issues in this case and you will not consider it in any manner in arriving at your decision as to the guilt or innocence of either of the defendants in this case.

Does that cover the subject?

Ready to start with the argument?

Mr. NEWCOMB: Yes.

No exception was taken to the instruction.

Petitioners now contend (Caudle Pet. 31–32; Connelly Pet. 32–34) that the unavoidable removal of Schwimmer as a defendant because of his heart attack and his incapacity to stand trial made it incumbent on the trial court to grant their motions for mistrial. They base their contention on the ground that the instructions of the court in the first instance to limit the particular evidence to Schwimmer, and the further extended instructions, after Schwimmer's mistrial, to disregard this evidence altogether, could not cure the prejudicial effect of its admission.

This Court has held that even admissions and confessions of a co-conspirator may, in certain instances, be admitted and limited to the declarant in a conspiracy case under proper instructions of the court to such effect. *Delli Paoli* v. *United States,* 352 U. S. 232, 242–243; *Opper* v. *United States,* 348 U. S. 84, 95; *Lutwak* v. *United States,* 344 U. S. 604, 618–619; *Blumenthal* v. *United States,* 332 U. S. 539, 551–553. Obviously, the evidence admitted as to Schwimmer in

this case was in no sense an admission or a confession. It did not even tend to implicate Schwimmer in a conspiracy, much less the petitioners. Relating to Schwimmer's post-conspiracy activities, the evidence tended at most to demonstrate Schwimmer's own reluctance to make full disclosure to the grand jury. Such conduct would not be imputed to petitioners even if the evidence had not been limited in the first instance and had not been later expunged by full instructions—instructions which were not objected to but which were apparently acquiesced in by defense counsel.

If such evidence, irrelevant to petitioners, had been volunteered by a witness in a trial without Schwimmer it would normally have been ordered stricken and there would, we submit, have been no suggestion of a mistrial. The evidence was plainly not of the inflammatory or highly prejudicial sort which would require starting the trial all over again with a different jury. The fact that a mistrial was declared as to Schwimmer because of his health does not make the evidence any more prejudicial. Nor does a mistrial as to Schwimmer because of his health require a mistrial as to petitioners (which would not otherwise be had) because of this Schwimmer evidence.

The removal of Schwimmer, who was unable then or in the foreseeable future to stand trial, placed the petitioners in no different position than their pretrial motions for severance would have placed them, or in a different position than would have existed had Schwimmer been named only as a co-conspirator and

not a defendant, or had he died. And, as the Court of Appeals observed, there is no showing whatever that Schwimmer's continued presence in the trial would have constituted an advantage to petitioners (see Connelly Pet. App. A, pp. 10a–11a).

V

Admissibility of Exhibit 100 (j)

Petitioners contend that the trial court erred in admitting over their objection a page of defendant Schwimmer's account books, the contents of which are as follows (Pl. Ex. 100 (j)):

Oct—49

Loan $2500
From I. Sachs
Shu-Stiles ---------- $10,000
Pd out Oil Royalty M. C.------ 4,200

5,800

Held in Escrow to be paid out depending on whether I. Sachs case is dropped.

This entry was admitted under an exception to the hearsay rule as an act or declaration of the co-conspirator Schwimmer made in the course of and in furtherance of the conspiracy. Petitioner Caudle's counsel conceded on trial that it would be so admissible if there were evidence sufficient to establish conspiracy (T. 2216).

Initially, it should be observed that there is no question as to the authenticity of the document as one page of Schwimmer's account book, the other parts

of which (Pl. Exs. 100 (b) to (s)) were admitted in evidence (Tr. 1639–1640, 1996, 1998–2003). Aside from the entries on the document, there was independent proof that on October 12, 1949 co-conspirator Sachs, president of Shu-Stiles Inc., gave Schwimmer a $10,000 check from its treasury (Tr. 271–279, 294, 372; Pl. Ex. 21 (j)) in addition to a prior payment of $2,500 on September 22, 1949 (Tr. 1963; Pl. Ex. 21 (i)) also reflected in the exhibit. And in addition to the fact that this payment comes at a crucial point in respect to petitioner Connelly's efforts in the Sachs case, it was made under conditions of secrecy since Sachs' other attorneys were not informed of its payment (Tr. 372–373, 841) and it was made outside of the fee arrangement previously agreed on between Sachs' attorneys (Pl. Ex. 8 (i)).

The use of the symbols "M. C." to refer to petitioner Matthew Connelly was evidenced by their use in other documents (Pl. Exs. 189, 190). There was also evidence that Schwimmer deposited the $10,000 check on October 24, 1949 (Pl. Ex. 21 (j); Tr. 1965–1966) and, after talking with petitioner Connelly (who arranged a meeting between Schwimmer and petitioner Caudle the same day) (Tr. 1553–1554, 1584, 2601), and after negotiating for the purchase of the oil royalty for petitioner Connelly, he later drew the royalty purchase check from the same bank account (Tr. 1095–1102; Pl. Ex. 77).

As the two district judges and the Court of Appeals held, this document was admissible against petitioners as an act and declaration of a co-conspirator made in furtherance of the conspiracy. *Lutwak* v. *United*

States, 344 U. S. 604, 617; *United States* v. *United States Gypsum Co.,* 333 U. S. 364; *Wiborg* v. *United States,* 163 U. S. 632, 657–658; *Cwach* v. *United States,* 212 F. 2d 520, 525 (C. A. 8); *Baker* v. *United States,* 156 F. 2d 386 (C. A. 5); *McDonald* v. *United States,* 89 F. 2d 128, 135 (C. A. 8), certiorari denied, 301 U. S. 697; *Wood* v. *United States,* 84 F. 2d 749 (C. A. 5); *Marron* v. *United States,* 8 F. 2d 251 (C. A. 9); *Thomas* v. *United States,* 156 Fed. 897, 909–910 (C. A. 8).

The cases cited by petitioner Caudle (Caudle Pet. 37), to the effect that such documents are not admissible if mere records of past events and if not made in the course of the conspiracy, have no relevance to the case at bar. The jury was entitled to believe that this entry, which was made at the most significant stage of the proven conspiracy, not only was a record which stated the essence of a conspiratorial agreement already made, but that it was to be the basis for the future disbursement from a reserve of money to be paid out as the illicit objectives of the conspiracy were achieved. It was in effect the working agreement under which petitioner Connelly was to be paid, not only for his past services but for services to be rendered. On that basis it was clearly admissible. The further contention that a conspiracy was not proved by independent evidence, the foundation upon which the exhibit was admitted, has been resolved against petitioners in the courts below, and under this Court's practice is not an issue for further review. *Kann* v. *United States,* 323 U. S. 88, 93.

VI

Admissibility of Government records of telephone conversations

Petitioner Caudle contends (Caudle Pet. 38–39) that certain transcriptions made by secretaries to Chief Counsel Oliphant of the content of official calls to his office, pursuant to the established practice in that office, which were admitted in evidence through their authors, were not records made in the "regular course of business" under the Federal Business Records Act (28 U. S. C. 1732, 1733). It is argued that the record was not kept in the regular course of business "because it was not made pursuant to any regulation or order of the Treasury Department" (Caudle Pet. 38).

This issue is fully discussed in the opinion of the Court of Appeals (Caudle Pet. App. B, pp. 103–104) which found, on review of the evidence (*ibid.*, p. 104), "that these records were made in the usual and systematic course of the business to which they had reference and they specifically referred to actions occurring at the time of their entry" (see Tr. 540–592, 658–664). Petitioner Caudle cites no case in conflict with the holding below. Compare *Finnegan* v. *United States*, 204 F. 2d 105, 111–112 (C. A. 8), certiorari denied, 346 U. S. 821.

VII

Competency and discretion of the successor judge

Petitioners strongly urge error arising from the circumstances that some time after the jury had

returned its verdict the trial judge died, and post-trial motions were ruled on by a successor judge (Caudle Pet. 19–29; Connelly Pet. 24–39). The relevant facts are these:

At the close of the trial on June 11, 1956, petitioners filed motions for judgment of acquittal as to which Judge Hulen, who conducted the trial, reserved his ruling at that time (R. 115–118; Tr. 2888, 2910; and see: Tr. 2215). Although Judge Hulen made no explicit ruling on the motions for acquittal prior to the closing argument to the jury,[13] he did rule admissible government Exhibit 100 (j) (see *supra*, pp. 29–30) on the theory that it was an act or declaration made in furtherance of a proven conspiracy (Tr. 2912).

On June 14, 1956 a verdict of guilty was returned against each petitioner (R. 118). At this point Judge Hulen asked (Tr. 3201), "Do the defendants have any suggestion about motions for a new trial or time for filing motions?". Although defense counsel for Caudle adverted to the fact that the motions for judgment of acquittal were still pending, he stated that he would file a motion for a new trial that day (Tr. 3201–3202); defense counsel for Connelly said that he would file a similar motion very promptly (Tr. 3202). Judge Hulen gave petitioners five days in which to file post-trial motions for judgment of acquittal or alternatively for a new trial and set July

[13] The petitioners' motion for mistrial had been extensively argued during trial (Tr. 1535–1547) and was denied by Judge Hulen (Tr. 1547). It is clear that petitioners understood that Judge Hulen had ruled on this motion as they admitted in their joint motion filed on June 19, 1956 (R. 122).

19, 1956 for the hearing of the motions and imposition of sentence (Tr. 3201–3202).

On June 19, 1956 petitioners filed their joint motion for acquittal, or in the alternative for a new trial (R. 119–126), and they were given an additional five days in which to file supplemental motions for a new trial. On July 7, 1956, before hearing these motions, Judge Hulen died. The United States Attorney subsequently moved pursuant to Rule 25, F. R. Crim. P., to procure the services of another judge in the case (R. 127), which motion was granted by Chief Judge Gardner, who designated Judge Nordbye (R. 127).

After a hearing on the motions, Judge Nordbye denied them on February 11, 1957 (R. 142), setting forth his reasons in his opinion-order of February 8, 1957 (Caudle Pet. 43–83; Connelly Pet. App. C, pp. 24a–63a), in which he prefaced his discussion of the legal issues with a statement as to his competency to consider the motion under the order designating him as successor judge (see Caudle Pet. 43–46), and reviewed the evidence which he found legally sufficient to sustain the convictions (see *ibid.*, pp. 60–83). On March 5, 1957, Judge Nordbye heard and denied a third supplemental defense motion for a new trial and sentenced the petitioners (R. 153).

In its opinion affirming the judgments appealed from, the Court of Appeals found, *inter alia,* that under the circumstances of this case Judge Nordbye was competent under Rule 25, F. R. Crim. P., to act as successor judge and to hear and determine the post-trial motions for acquittal and for a new trial, and

agreed with his conclusion that the evidence was legally sufficient (see Caudle Pet. 87–90, 98–102).

Petitioners (Caudle Pet. 19–29; Connelly Pet. 24–37) have two basic arguments with respect to the successor judge: (1) that they were deprived of a constitutional right to have the sufficiency of the evidence ruled on by a judge who heard the witnesses, and (2) that in any event it was an abuse of discretion for the successor judge to rule on the post-trial motions. We believe both contentions are without merit.

1. (*a*) The premise of petitioners' argument that they were deprived of a fair trial is the theory that the standard by which a trial judge weighs the sufficiency of the evidence is different than that used by a judge who has not personally heard the witnesses. But a presiding judge does not take to himself the function of the jury. He is not to rule on the sufficiency of the evidence in the light of his personal view as to the credibility of the witnesses. The jury was entitled to disbelieve petitioners even if Judge Hulen might have thought that they were telling the truth. It is for the jury "to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference" (*Holland* v. *United States,* 348 U. S. 121, 140), and the "verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it". *Glasser* v. *United States,* 315 U. S. 60, 80. By hypothesis, the trial judge is in error if he applies a different standard or reaches a different conclusion as to the sufficiency of the evidence than that of the appellate court.

No doubt, appellate courts sometimes refer to the deference which is due to the conclusions reached by a judge who heard the witnesses and presided at the trial. But such deference is not owing because the trial judge may have ideas as to the credibility of the witnesses, but rather because he is more familiar with the evidence and has spent more time upon it and upon the inferences which may properly be drawn. Certainly, petitioners cannot attack the time which Judge Nordbye devoted to the record, nor, in the light of his opinion, can they say that he was not familiar with the evidence.

(*b*) A second premise to petitioners' argument is that Judge Hulen, who presided at the trial, did not rule on the sufficiency of the evidence.[14] Judge Hulen disposed of the trial motions for acquittal, at least for the time being, by submitting the case to the jury. He also admitted Government Exhibit 100 (j), which

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[14] Petitioner Connelly (Pet. 26) suggests that the successor judge made no ruling upon the motion for acquittal—"In consequence, the motion for acquittal was decided neither by Judge Hulen nor by Judge Nordbye * * *." The facts are otherwise. Although Judge Nordbye did not independently discuss the motion for acquittal, he devoted to the sufficiency of the evidence some twenty pages of his opinion (Caudle Pet. 60–83) which concluded:

> It follows, therefore, that the respective motions of defendants Matthew J. Connelly and T. Lamar Caudle, and each of them, for a judgment of acquittal, or in the alternative for a new trial, must be, and the same hereby are, in all things denied.

See also Judge Nordbye's statement (Caudle Pet. 45, emphasis added):

> It seems reasonably clear that he [Judge Hulen] assumed that there was sufficient evidence * * * *and in this view I concur.*

depended for its admission on there being in the record sufficient evidence to warrant the conclusion that the conspiracy was proved. In substance, therefore, the judge who heard the evidence did rule that there was enough evidence to take the case to the jury.

Petitioners refer to indications that Judge Hulen "reserved" his ruling on the motions for judgment of acquittal (Caudle Pet. 20). Under Rule 29, F. R. Crim. P., "If the motion [for acquittal] is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial". There is thus always a second opportunity to have the trial judge rule on the sufficiency of the evidence. Whether the trial judge makes a provisional ruling before submitting the case to the jury and a final ruling later, or denies the motion on the first occasion leaving petitioners with the right to file it again after the verdict, is mainly a matter of form. In either case, the first ruling is not final, and in either case the judge may later change his mind. Judge Hulen certainly made the initial decision to send the case to the jury.

(*c*) It has been long recognized that post-verdict motions may be ruled on by a different judge than the one who presided at the trial. The assignment of Judge Nordbye was made pursuant to Rule 25 of the Federal Rules of Criminal Procedure:

> If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt,

> any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

The Rule clearly grants the successor judge the power to exercise all the duties to be performed by the trial court after a verdict of guilt.

The power of a succeeding judge to determine motions for new trial and other motions, and to pronounce sentence in a federal criminal case tried before another judge who died or was otherwise incapacitated, has been recognized both before and after the promulgation of Rule 25.[15] A similar power exists in civil cases (see Rule 63, F. R. Civil P.).[16] Petitioners can cite no authority in conflict with these precedents nor, indeed, any specific ambiguity in Rule 25, F. R. Crim. P., warranting review by this court.[17]

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[15] *Simons* v. *United States*, 119 F. 2d 539, 544–545 (C. A. 9); *King* v. *United States*, 25 F. 2d 242 (C. A. 6); *Chin Wah* v. *United States*, 13 F. 2d 530 (C. A. 2); *Meldrum* v. *United States*, 151 Fed. 177 (C. A. 9); *United States* v. *Green*, 143 F. Supp. 442 (S. D. Ill.). The power of the successor judge to determine his own competency in the first instance and to pass on motions for a new trial and to allow bills of exception where the trial judge had died or was disabled was specifically conferred by the Act of June 5, 1900, 31 Stat. 270. See *Meldrum* v. *United States*, *supra* (151 Fed. at p. 182).

[16] *New York Life and Fire Insurance Co.* v. *Wilson*, 8 Pet. 291, 303; *St. Louis Southwestern Ry. Co.* v. *Denwood*, 157 F. 2d 337, 342 (C. A. 8), certiorari denied, 330 U. S. 836; *McIntyre* v. *Modern Woodmen*, 200 Fed. 1, 5 (C. A. 6); *Pessagno* v. *Euclid Inv. Co.*, 35 F. Supp. 743 (D. C. D. C.); *Cahill* v. *Mayflower Bus Lines*, 7 F. Supp. 869 (D. C. N. Y.).

[17] The two cases cited by petitioner Connelly, *Brennan* v. *Grisso*, 198 F. 2d 532 (C. A. D. C.) and *Federal Deposit In-*

2. The successor judge did not abuse his discretion in failing to order a new trial because of the death of Judge Hulen. Rule 25 makes it clear that the presumption is that the successor judge will sit and will rule on pending motions. It is only if the successor judge "is satisfied that he cannot perform those duties" that he is given the discretion to order a new trial on that ground. And the Rule is specific that the decision whether or not the death of the trial judge requires a new trial is one for the successor judge to make "in his discretion". There is no basis for asserting that Judge Nordbye abused that discretion.

As the Court of Appeals observed, while Judge Nordbye was assigned to perform the unfinished functions of the deceased trial judge on June 16, 1956 (Caudle Pet. 87–88)—

> he did not hear the pending motions until some six months later and it is quite apparent from this record that in that time he thoroughly familiarized himself with the facts and satisfied himself that he could perform the duties to be performed by the presiding judge.

Judge Nordbye himself stated (Caudle Pet. 45) that it was "after consideration of the entire record" that he concluded that "I should not evade the responsibility which rests upon me by summarily granting a new trial".

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surance Corp. v. *Siraco*, 174 F. 2d 360 (C. A. 2) (Connelly Pet. 27–28), involve the dissimilar problem arising where, in a civil case tried without a jury, the trial judge died without rendering findings of fact and conclusions of law so as to make it impossible to determine whether additional evidence, tendered in a motion for new trial, would have affected the result.

The character of this case was not such as to require a departure from the normal procedure provided by Rule 25. The bulk of the government's case, and certainly the most critical items of evidence (which petitioners apparently recognize in other portions of their briefs), were comprised of documentary and other recorded proof [18] which the defense did not, in the main, seek to dispute or rebute, but which they sought to explain either on the basis of lack of knowledge of the transactions which were recorded or by self-serving interpretations of the inferences to be drawn. Even now, the petitioners do not contend that any government witness was seriously impeached either by cross-examination or by rebuttal evidence, and the only challenge to the documents themselves goes to their technical admissibility rather than their authenticity. The charge of conspiracy here, as in most conspiracy cases, depended upon circumstantial evidence of concert and connivance between the conspirators, *i. e.*, inferences to be drawn from proven facts. See *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2) (per Mr. Justice Sutherland). But here, unlike many such cases, the proof of facts upon which such inferences depend, had not been seriously challenged; in short, the government's case did not rest on the issue of the credibility of its witnesses but on the issue whether the inferences on which it relied to prove its case could validly be drawn from that uncontroverted body of proof. As

[18] 200 exhibits were introduced in the case comprising more than 1,000 pages.

the Court of Appeals observed (Connelly Pet. App. A, p. 6a), "[i]n these circumstances there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor that could not be gained by reading the testimony * * *."

VIII

Sufficiency of the evidence

Petitioner Caudle (Pet. 39–42) raises a question as to the sufficiency of the evidence as to him. As indicated above, the District Court and the Court of Appeals considered the long record and concluded that the evidence warranted the jury's verdict. The evidence against petitioners is summarized in the long opinion of Judge Nordbye (Caudle Pet. 43–83) and in the opinion of the Court of Appeals (Caudle Pet. 84–106). Those statements demonstrate that the evidence is sufficient. This Court need not review the concurrent determination of both courts below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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